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# Congressional Delegation of Spending Power to the Defense Department in the Post-9-11 Period

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# Congressional Delegation of Spending Power to the Defense Department in the Post-9–11 Period

PHILIP J. CANDREVA and L. R. JONES

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The advantages of increased delegation of resource management authority by Congress have long been argued by defense leadership. It is an important issue because of its relevance to congressional assessment of defense management, budget priorities, and how to enforce policy preferences. This paper investigates the series of supplemental appropriations for the war on terrorism to determine (a) under what conditions, and how and why Congress delegates budget authority to defense, (b) what happened with respect to the degree of delegation after appropriation during budget execution, and (c) what this case teaches us about the evolving budgetary relationship between Congress and the Defense Department.

The possibility of obtaining increased delegation of resource decision authority from Congress has captivated defense budget officials and reformers since the late 1960s. Prior to the 1960s, defense programs and budget appropriations were approved more easily and in a far less controversial manner than the way the process has operated since “hawks” and “doves” began a protracted battle in the halls of Congress over the Vietnam War. Objections to the Vietnam War and the spending plans of President Lyndon Johnson caused an increase in congressional authorization and appropriation detail and

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specificity, and greater budget execution oversight. More recently, Congress has deliberated over and voted for appropriations to pay for wars in Afghanistan and Iraq. Many of the same issues with respect to delegation of congressional budgetary authority and control raised during the Vietnam War era have been debated anew since the United States initiated military response to the attacks on the World Trade Center and the Pentagon in September 2001.

The degree of resource decision flexibility and delegation of authority from Congress to the Department of Defense (DOD) has been examined by observers of congressional defense budgeting and management for decades.<sup>1</sup> Delegation of budget authority is an important issue because it is highly relevant to (a) congressional assessment of defense budget priorities and how best to enforce its policy preferences in DOD budgeting, (b) analysis of proposals to reformulate defense programs and budget priorities, (c) how to execute defense spending to greatest benefit, (d) selection of alternative appropriation strategies within Congress, and (e) analysis of the effects of congressional control on DOD budget execution and management practices.

The advantages of increased delegation of resource management authority by Congress have long been asserted by DOD leadership. For example, DOD Comptroller Robert Anthony developed an extensive plan for reorganizing defense accounting and budgeting under Project Prime in the mid-1960s, but Congress rejected the proposal.<sup>2</sup> Defense Secretary Frank Carlucci asked Congress for increased resource and managerial powers at the end of the Reagan administration in 1988. Defense Secretary Dick Cheney proposed six acquisition programs in the 1991–1994 time frame for execution without congressional oversight as a test of the DOD’s ability to operate efficiently independent of external micromanagement. Despite considerable congressional lip service to the effect that these proposals would increase program management and budget execution efficiency and better “bang for the buck” in defense, Congress supported neither Carlucci’s nor Cheney’s request.

Most recently, Defense Secretary Ronald Rumsfeld offered a set of legislative proposals under the umbrella title, Defense Transformation for the 21st Century Act. Included among the proposals were requests for greater autonomy in budget execution. Congress largely ignored the budgetary proposals and devoted most of their attention to the more public proposal (creation of the National Security Personnel System). Given

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1. See, for example, Norman Augustine, *Augustine’s Laws* (New York: American Institute of Aeronautics and Astronautics, 1982); A. Kanter, *Defense Politics*; J. R. Fox with J. L. Field, *The Defense Management Challenge: Weapons Acquisition* (Boston: Harvard Business School Press, 1988); J. S. Gansler, *Affording Defense* (Cambridge, MA: MIT Press, 1989); F. Thompson and L. R. Jones, *Reinventing the Pentagon: How the New Public Management Can Bring Institutional Renewal* (San Francisco: Jossey-Bass, 1994); and Jerry McCaffrey and L. R. Jones, *Budgeting and Financial Management for National Defense* (Greenwich, CT: Information Age Publishing, 2004).

2. Lawrence R. Jones and Fred Thompson, *Public Management: Institutional Renewal for the Twenty-First Century* (Stamford, CT: JAI Press, 1999).

this longstanding absence of trust of DOD management and budgetary judgment, it is significant when Congress deviates from traditional patterns of control. This is why examination of the case of the Defense Emergency Response Fund (DERF) is worthwhile. In approving the DERF Congress appeared to be investing a significant degree of trust in DOD management and budget execution capability.

The purpose of this paper is to investigate the case study of the DERF to determine (a) under what conditions, and how and why Congress delegates budget authority to the Department of Defense (DOD), (b) what happened with respect to the degree of delegation initially provided in the DERF after appropriation during budget execution, and (c) what this case teaches us about the constantly evolving budgetary relationship between Congress and the DOD.

## CONGRESSIONAL OVERSIGHT OF DEFENSE BUDGET EXECUTION AND MANAGEMENT

Much has been written about congressional tendencies to “micromanage” the Defense Department explaining the incentives, describing the costs and benefits of its effects, debating whether it should occur, and documenting the manner in which it occurs. In this section, that literature is quickly summarized to provide a foundation for understanding Congress’ propensity for activism. Such a foundation is necessary for making sense of why Congress delegated authority to the executive in the DERF appropriation then later rescinded that authority.

The literature is fairly consistent in the analysis of why Congress tends to micromanage DOD, with respect to theoretical hypotheses on the variables that explain close congressional oversight and absence of delegation. In summary, Congress has traditionally exercised control as constitutional prerogative,<sup>3</sup> to shape defense policy,<sup>4</sup> in response to media publicity of defense mismanagement,<sup>5</sup> and because of partisan congressional-executive branch competition and occasional mistrust.<sup>6</sup> As the defense budget has historically accounted for at least half of all federal discretionary spending, it is a favorite target for those legislators seeking to influence federal spending even for

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3. Fox; Mackubin Thomas Owens, “Micromanaging the Defense Budget,” *The Public Interest* 100, Summer (1990): 131–146; James M. Lindsay, “Congressional Oversight of the Department of Defense: Reconsidering the Conventional Wisdom,” *Armed Forces and Society* 17, no. 1, Fall (1990): 7–33.

4. Lawrence R. Jones and Glenn C. Bixler, *Mission Financing to Realign National Defense* (Greenwich, CT: JAI Press, 1992) and Kenneth R. Mayer, “Policy Disputes as a Source of Administrative Controls: Congressional Micromanagement of the Department of Defense,” *Public Administration Review* 53, no. 4 (1993): 293–302.

5. Fox; Lindsay; and Jones and Bixler.

6. Barry M. Blechman, *The Politics of National Security: Congress and U.S. Defense Policy* (New York: Oxford University Press, 1990); Mayer; and Thompson and Jones.

nondefense matters.<sup>7</sup> A final reason is the advocacy or protection of constituent interests, e.g., military installations, labor, or defense contractors.<sup>8</sup>

It is not only important to examine why Congress tends to control defense, but it is also useful to examine the manner in which that oversight occurs. The literature provides us with a framework of tools including restrictions on the use of funding, tools for gathering information, and accounting requirements. Regarding the use of funding, they may make line item adjustments to the budget<sup>9</sup>; earmark funds for specific purposes<sup>10</sup>; place restrictions on the reprogramming and transfer of funds between accounts<sup>11</sup>; and restrict funds pending executive compliance with provisions of law or committee reports.<sup>12</sup> They gather information formally in congressional hearings and informally between congressional and DOD staff outside of hearings or through the use of reviews, audits, and investigations by committee staff, General Accounting Office (GAO), and CRS.<sup>13</sup> Finally, Congress may place requirements on program execution or may specify reports on myriad topics.<sup>14</sup>

Strong incentives are present for Congress to actively micromanage defense policy and budgets, and congressional rules and procedures provide many means by which to control DOD through authorization, appropriation, and oversight. The case study of the DERF, as explained in the sections of the paper that follows, illustrates how Congress responded to this budgetary incentive structure from 2001 to 2003. The purpose in investigating this case in detail is to determine more specifically under what circumstances Congress chooses to exercise more or less control over the DOD management and budgeting.

## RESPONSE TO CRISIS: A CASE STUDY

From September 2001 to October 2003, the DERF was used by Congress to delegate budget authority to the DOD. DERF was an account designed to provide flexibility in times of crisis, to provide obligation authority when a need arises, but before the specifics

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7. Fox; Owens; Morton H. Halperin and Kristen Lomasney, "Playing the Add-On Game in Congress: The Increasing Importance of Constituent Interests and Budget Constraints in Determining Defense Policy," in *The Changing Dynamics of U.S. Defense Spending*, ed. Leon V. Sigal (Westport, CT: Praeger Press, 1999), 85–106; and Aaron Wildavsky and Naomi Caiden, *The New Politics of the Budgetary Process*, 4th ed. (New York: Longman Press, 2001).

8. Lindsay; Blechman; Jones and Bixler; and W. D. Hartung, "The Shrinking Military Pork Barrel: The Changing Distribution of Pentagon Spending, 1986–1996," in *The Changing Dynamics of U.S. Defense Spending*, ed. Leon V. Sigal (Westport: Praeger Press, 1999), 29–84.

9. Lindsay; Blechman; Mayer; Thompson and Jones; and Halperin and Lomasney.

10. Owens; Mayer.

11. Fox; Jones and Bixler; and Wildavsky and Caiden.

12. Owens.

13. Fox; Owens; Blechman; Lindsay; Jones and Bixler; Mayer; and Thompson and Jones.

14. Owens; Jones and Bixler.

of the need are known. The global war on terrorism is just that sort of scenario: there existed a need to conduct unconventional warfare, but because of the nature of the operations, it was impossible to precisely predict how much funding was required in the usual form of appropriations. Unknown were the specifics of how much for each service, in which account, for reserves or active forces, to buy what, to be used when. Those decisions, the administration argued, should be made by the Combatant Commander based on military effectiveness and national security, not the constraints of a comptroller's best guess. According to the administration, flexible authority was required and, thus, was requested.

The "Emergency Response Fund, Defense" was initially created in the Fiscal Year (FY) 1990 Department of Defense Appropriation Act (PL 101-65) and was provided \$100 million of obligation authority without FY limitation to its use. These funds were to be used for reimbursement of other appropriations when used by the Defense Department in support of state and local governments when responding to natural or manmade disasters. Reimbursements would be deposited in the fund and would remain available until expended. As originally conceived, DERF was not a mechanism for funding Defense Department military activities overseas; instead it was designed to facilitate the use of the department to address domestic problems (e.g., fighting forest fires).<sup>15</sup>

Military actions overseas were traditionally funded through existing operations accounts if they were sufficient or through emergency supplemental appropriations.<sup>16</sup> Given the increased frequency of contingency operations since the end of the Cold War, in February 2001 the DOD updated the Financial Management Regulations to specifically address the issue of funding contingency operations.<sup>17</sup> It is DOD policy not to budget for contingency operations, but rather to budget for a peacetime military. DOD further "requires that controls, accounting systems, and procedures provide, in financial records, proper identification and recording of costs incurred in supporting contingency operations."<sup>18</sup> Having autonomy in budget execution is useful when faced with emergencies that were not part of the Department's original budget. This became especially true in the 1990s when the armed forces were used overseas six times more frequently than during the Cold War.<sup>19</sup> However, this policy document explicitly states that war-time activities are not covered and represent an exception to Defense budgeting.

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15. The DERF was so seldom and modestly used in the 1991–2001 period that comparative case analyses would have been unfruitful.

16. Jerry McCaffrey and Paul Godek, "Defense Supplementals and the Budget Process," *Public Budgeting and Finance* 23, no. 2, Summer (2003): 53–72.

17. Department of Defense, "Department of Defense Financial Management Regulation," DOD 7000.4-R, Volume 12, Chapter 23 (January 2005); available from: <http://www.DOD.mil/comptroller/fmr/>; accessed 8 July 2005.

18. *Ibid.*, para 230104.

19. Richard F. Grimmett, *Instances of Use of United States Armed Forces Abroad, 1798–2001*, Congressional Research Service Report RL30172 (Washington, DC, February 2002).

In response to the terrorist attacks of September 11, 2001, President George W. Bush submitted to Congress a request for a FY 2001 supplemental appropriation of \$20 billion. Costs associated with the immediate response and recovery efforts were properly chargeable to the FY 2001 appropriations, yet those funds were nearly depleted as there were less than three weeks remaining in the FY. One week later, Congress appropriated \$40 billion in a transfer account in Public Law 107-38, *Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States*. While the funds had intentionally few restrictions ex ante, there were ex post requirements placed on the executive branch. For example, \$10 billion was provided immediately, \$10 billion more was available within 15 days of notification by OMB to Congress of the planned use of the funds, and the remaining \$20 billion was available only after subsequent request and enactment, and the bill required periodic reporting of transfers and outlays.

Between September 21 and November 30, 2001, the president provided Congress details on the use of the first \$20 billion and on October 17, 2001, requested the remaining \$20 billion. The Defense Department portion of the first \$20 billion totaled \$13.74 billion and of the second increment, \$7.4 billion. During this time, OMB issued Bulletin 02-01 which provided reporting requirements to the heads of agencies. OMB promised Congress quarterly reports, on the condition that OMB obtained monthly information from the executive agencies. The reports required data on obligations and outlays in 10 broad spending categories. Of note is that these 10 categories do not correspond with either the DOD's 11 major force programs or the structure of its regular appropriations. These distinctions proved problematic when accounting for the DERF. A view of the first DOD report is provided in Table 1.

How can we explain Congressional actions? The political atmosphere the week after the terrorist attacks was one of self-preservation through unity. Bipartisan and intra-governmental politics are viewed as petty during a crisis. There was a clear understanding that recovery and response would be expensive and that providing funding was one of the few tangible acts Congress could take. Referring to Congress, Stephen J. Wayne of Georgetown University was quoted in *Congressional Quarterly*, "Their role at the moment is to cheer [the president] on, to show unity and give him what he wants."<sup>20</sup> The administration requested \$20 billion without restrictions and Congress was nearly willing to provide it, when a few members raised concerns, most notably Rep. David R. Obey (D-WI), ranking member of the House Appropriations Committee. "The problem is, when you give any White House \$20 billion with not a single string attached . . . you have abdicated Congress' responsibility," said Obey.<sup>21</sup> The ensuing compromise was the \$40 billion appropriation described above. The incentives for Congress were to appear

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20. John Cochran and Mike Christensen, "Regrouping with a Common Purpose," *Congressional Quarterly Weekly*, 15 September 2001, 2114.

21. Mary Dalrymple, "Obey Sounds a Solitary Warning against Carte Blanche," *Congressional Quarterly Weekly*, 15 September 2001, 2131.

**TABLE 1**  
**Example of Office of Management and Budget/Emergency Response Fund Expenditure Report**

**Report on Expenditures from the Emergency Response Fund Amounts as of November 30, 2001  
(In Thousands of Dollars)**

<b>Department of Defense</b>	<b>Budget Authority</b>	<b>Obligations</b>
Increased situational awareness	\$4,056.9	\$1,302.7
Enhanced force protection	1,509.0	361.4
Improved command and control	1,273.0	163.7
Increased worldwide posture	3,542.3	651.9
Offensive counterterrorism	1,490.0	76.4
Procurement	0.0	0.0
Initial crisis response	606.0	153.1
Pentagon repair/upgrade	530.0	480.0
Other	100.0	100.0
Airport security	228.0	19.1
Total	\$13,335.2	\$3,308.4

*Source:* Office of Management and Budget, “Quarterly Report to Congress on the Use of the Emergency Response Fund,” 23 January 2002.

unified and to support the nation through the appropriation of funds as expeditiously as possible. Doing so without unduly eroding their constitutional authority over the power of the purse was almost an afterthought.

The September 2001 emergency supplemental appropriation (PL 107-38) placed the entire sum in an emergency response fund at the Executive Office of the President. The act provided the president authority to transfer funds “to any authorized Federal Government activity” and a portion of the funds became DERF when transferred to the DOD. This was a logical account in which to place the funds—it already existed and was created for disaster response. Per the design of DERF and the language of the supplemental appropriation, the funds could be used by the Defense Department for any type of expenditure in response to and recovery from the terrorist attacks. The funds could not, however, be easily transferred to other DOD appropriations. Subsequent transfer authority was not provided with the supplemental appropriation. Many defense activities spent considerable sums from other appropriation titles, such as Operations and Maintenance, on recovery and response tasks. While these obligations were necessary to meet urgent requirements, without specific transfer authority, they may have been in violation of the fiscal law that prohibits using funds “otherwise provided for” and the improper augmentation of one appropriation with funds from another. The Defense Department sought legislative approval to transfer obligation authority from DERF to these other appropriations to reimburse those expenses that would be more appropriately paid with DERF.



Such transfer authority was provided in December 2001 when the *National Defense Authorization Act for Fiscal Year 2002* was enacted (PL 107-107). Among the provisions of the Act, Sections 1502 and 1503 authorized DERF for FYs 2001 and 2002, respectively, in the exact amounts already transferred (or requested) by the administration, validating the administration's judgment in the allocation of these funds. Section 1506 further codified the reporting mandated in the supplemental appropriations bill. While this was authorizing, not appropriating legislation, the transfer authority was granted and allowed the department significant latitude by giving lower echelon commands the ability to spend available dollars with the expectation of being reimbursed by DERF. It is also significant in that Congress affirmed the administration's discretion on the use of the original \$40 billion.

DERF was considered a blessing at the lower-level commands. The deputy comptroller for the Navy Special Warfare Command said, "The primary advantage of DERF for field operators was its lack of appropriation restrictions such as funds expiration and investment threshold. There was no obligation rate or year-end pressure so funds could be planned more effectively. There were no procurement [threshold] restrictions so operators could get what they needed."<sup>22</sup> Ordinarily, Congressional appropriations are restricted by their purpose, a time horizon, and the amount. Thus, the economic rationality of an individual spending decision is constrained by the political objectives which defined the appropriation. For example, only items that cost under \$250,000 may be purchased with operations and maintenance funds even if a more economical item (say, in net present value terms) is priced slightly above the threshold. With DERF, only the grand total amount was constrained, which permitted the comptrollers within the department to execute in a more economically rational fashion. The same comptroller said, "Some new stuff made it to the field that never went thru [sic] the requirements process. That would have been impossible under normal appropriation law and procurement rules. My impression is that the upper levels of DOD management didn't like that much freedom in the field. It's too messy and excludes the central authority from the decision process. From an accounting standpoint DERF was a better way to do business."<sup>23</sup>

Those in the field did, however, acknowledge other accounting difficulties. Recall that the accounting categories for DERF did not align with Defense Department normal appropriations or the major force program structure used for budgeting. The comptroller noted, "In Aviation Maintenance, for example, it would have been nearly impossible to separate out dollars for parts spent on contingency missions from dollars spent on other missions. You would only have flying hour estimates. The view of Congress was that they poured in money and DOD couldn't show where they had spent the money."<sup>24</sup>

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22. Anonymous, 2003, Naval Special Warfare Command Official, Interview, July 24, 2003.

23. Ibid.

24. Ibid.

## ADDING RESTRICTIONS TO DERF

The DOD and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002 (PL 107-117) were enacted in early January 2002 and appropriated an additional \$3,395.6 million into DERF, directing the funds into six of the 10 spending categories. Of note is that these funds were directly appropriated into DERF (the September appropriation was provided to the president who later transferred it into DERF), so these funds are slightly more restricted ex ante than were the initial funds. Also of note are several earmarks, including \$500,000 for the White House Commission on the National Moment of Remembrance, a transfer of \$775 million to the Pentagon Reservation Maintenance Revolving Fund, and the authority to obligate up to \$100 million for payments to Pakistan and Jordan for logistical and military support. Wide transfer authority was provided but with the requirements for quarterly reports from the Secretary of Defense specifying the project and accounts to which funds were transferred. While it is quite common for such earmarks to occur in the annual appropriations bill, these were the first earmarks attached specifically to the emergency response fund. Table 2 displays these various pieces of legislation and other congressional actions, noting when they occurred and the control instrumentation used by Congress and its audit arm, the GAO, to influence DOD budget execution.

Emboldened by the flexible budgetary authority provided by the Congress, the administration presented to Congress the FY 2003 budget including in it a request for \$19.4 billion in DERF. Of that figure, \$9.4 billion was identified to specific programs affected by the war of terrorism, for example, the replacement of munitions, the cost to refurbish equipment, and the cost to replenish supplies. “The remaining \$10 billion ... is the pure wartime contingency,” Defense Department Comptroller Dov Zakheim testified to the Senate Armed Services Committee. “So it was a very conservative estimate that we needed for planning purposes and, as the secretary of defense said, to signal to everybody that we are committed to carry on.”<sup>25</sup> In essence, the administration requested for the subsequent FY (eight months in advance of the start of the year) a \$10 billion contingency fund in an account that had few restrictions. This was considered a contingency request in that Congress would appropriate the funds, but the president would be required to notify Congress of the need for the funds before he could access them. Congress historically had been reluctant to appropriate such funds because of their undefined and tentative nature, preferring to fund such contingencies—if they occur—with supplemental appropriations.

Including DERF in the annual budget was an unusual request. As noted earlier, the Defense Department does not, as a matter of policy, budget for contingency operations. Supplemental appropriations had been the traditional method of acquiring additional resources and took the form of specific requests for specific items to address the

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25. Dov S. Zakheim, Statement before the Senate Armed Services Committee Subcommittee on Readiness and Management Support, 6 March 2002.

**TABLE 2**  
**How Congress Controlled DERF Spending**

Legislation (Annotated)	Date Enacted	Budget Item Adjustments	Hearings and Informal Communication	Committees Involved			Structural Requirements Placed on Programs	Reporting Requirements	Reprogramming and Transfer Restrictions	Earmarked Funds	Fencing Funds Pending Compliance
				Besides HAC, SAC, HASC, SASC	HAC, SAC, HASC, SASC						
Emergency Supplemental Appropriation (PL 107-38). \$20 billion requested, \$40 billion provided in Emergency Response Funds; later transferred into DERF	09/18/01							Quarterly, undefined	None	None	X
National Defense Authorization Act for FY2002 (PL 107-107); provided requested transfer authority	12/28/01	X	X					Quarterly, defined	100% of DERF	Minimal	
Defense appropriations for FY2002 (PL 107- 117). Funds were appropriated directly into DERF categories.	01/10/02	X	X					Quarterly, further defined	Maintained	Increased	X
American Serviceman's Protection Act (PL 107- 206). Requested \$11.3 billion DERF, appropriated \$11.9 billion with significant restrictions.	08/01/02	X	X	X			X	Maintained	DERF was required to be transferred before being spent	Increased	X
Defense Appropriations for FY2003 (PL 107- 248). Budget requested \$19 billion in DERF; \$7.1 billion in supplemental funds were provided, but not as DERF.	10/23/02		X								

**TABLE 2 (Continued)**

Legislation (Annotated)	Date Enacted	Budget Item Adjustments	Hearings and Informal Communication	Committees Involved			Structural Requirements Placed on Programs	Reporting Requirements	Reprogramming and Transfer Restrictions	Earmarked Funds	Fencing Funds Pending Compliance
				Besides HAC, SAC, HASC, SASC	HAC, SAC, HASC, SASC						
Bob Stump National Defense Authorization Act for FY2003 (PL 107-314)	12/2/2002		X					Increased	Maintained	All	X
Consolidated Appropriations Resolution for FY2003 (PL 108-7); earmarked previously appropriated DERF	2/20/2003	X		X						X	
Emergency Wartime Supplemental Appropriations Act, 2003 (PL 108-11). Requested \$59.9 billion in DERF; appropriated \$62.2 billion of which \$15.9 billion was Iraqi Freedom Fund and \$5 billion of that was earmarked	4/16/2003	X	X			X			All DERF funds transferred to Iraqi Freedom Fund	X	X

**Other Congressional Actions**

**Date of Event**

Senate Armed Services Committee and Appropriations Committee Hearings  
 GAO Report on Contingency Operations Costs (GAO-02-450)  
 GAO provides preliminary findings to Congress on report GAO-02-1073  
 GAO Report on Contingency Operations Funding (GAO-02-1073)  
 Senate Armed Services Committee and Appropriations Committee Hearings  
 GAO Report on Tracking of Emergency Response Funds (GAO-03-346)

March 2002  
 May 2002  
 June 2002  
 September 2002  
 March 2003  
 April 2003

*Source:* Authors (2004).

DERF, Defense Emergency Response Fund; FY, Fiscal Year; GAO, General Accounting Office.

contingency. Reaching further in March 2002, on the heels of the FY2003 budget, the president requested an additional FY 2002 supplemental appropriation for the war on terrorism, assistance to New York City, homeland security, and other needs. Part of this \$27.1 billion request was \$14 billion for DOD of which \$11.3 billion was requested in the form of DERF. By this time, Congress was not inclined to lightly consider these requests.

In an attempt to gauge DOD ability to manage such funds, the appropriations committees used a common micromanagement tool asking the GAO to examine DOD's accounting for recent contingency operations. GAO noted that the accounting was generally good, but that there were instances of questionable costs being attributed to contingency operations. The appropriations committees made this issue a highlight of the spring hearings that were considering the FY 2002 supplemental and the FY 2003 regular appropriations.<sup>26</sup>

During homeland security hearings in May 2002, the Senate Appropriations Committee raised the issues cited in the GAO reports and asked the secretary of defense,

How can you assure this committee that any supplemental appropriations provided in the Defense Emergency Response Fund will be used only for the costs of the war, and not for unrelated or frivolous items? I wonder what kind of strings we might be able to write into the appropriations bills that will give to the elected representatives of the people in the legislative branch the where-withal that they may be assured that appropriate accountability is being given to the expenditure of the taxpayers' money.<sup>27</sup>

Political realities, however, were less idealistic and more pragmatic. This bill was very likely to pass since it was portrayed as primarily providing relief to New York City. Unrelated items of congressional constituent interest became riders and the bill grew to \$28.9 billion, including \$11.9 billion of DERF. Congress did attach strings: the DERF authority was earmarked for transfer into several accounts, the bill contained military construction funds for Army Corps of Engineers projects in seven different states, and the bill added special interest items including rules on immigration, the international criminal court, international AIDS programs, Pell student financial aid grants, Amtrak support, and federal nutrition programs (American Servicemembers' Protection Act of 2002). The administration received as much funding as they requested and most of the flexible spending authorities. However, these new funds were, in effect, simply reimbursement for those appropriations that were used in the time between requesting the supplemental and its enactment five months later.

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26. General Accounting Office, Defense Budget: Need to Strengthen Guidance and Oversight of Contingency Operations Cost, GAO-02-450 (Washington, DC, May 2002).

27. Congress, Senate, Appropriations Committee. *Homeland Security*. 107th Cong., 2nd session, 7 May 2002.

## CONGRESSIONAL SCRUTINY OF BUSH ADMINISTRATION REQUESTS FOR DELEGATED AUTHORITY

In the heat of the moment in September 2001, Congress provided broad budget execution authority to the executive branch, but in time was less willing to grant such authority. The Bush administration, on the other hand, was becoming bolder in its requests for delegation. At least through the first year since the terrorist attacks, Congress was willing to provide the administration more than the quantity of funds requested and most of the flexibility. But the trend showed increasing use of the tools of micromanagement. Congressional resistance to further delegation was grounded in two arguments: Defense Department accounting practices were unreliable and constitutional separation of powers.

Evidence on accounting problems was abundant and in some cases legendary. The Defense Department is one of three agencies still unable to achieve an unqualified Chief Financial Officer's Act-required audit opinion on their financial statements, and the best estimate is that it will be several years before this is possible. This reflects on the federal government at large: most of the material weaknesses preventing the federal government from earning an unqualified audit opinion stem from poor accounting practices within the Defense Department.<sup>28</sup> DOD had longstanding problems accounting for contingency operations: "We found that limited guidance and oversight combined with a lack of cost-consciousness contributed to the questionable expenditure of contingency funds."<sup>29</sup>

More importantly, Congress was leery of the constitutional issue raised by the administration's requests. They were unwilling to let go of their constitutional authority (Article I, Sections 8 and 9) to direct through the power of the purse what the DOD will do, when they will do it, and to what level of effort. The administration countered by offering an accounting of expenditures from the fund in lieu of restrictions on its use. Congressional response was to cite that the Constitution not only assigns them the responsibility to appropriate funds, but also requires a periodic accounting and reporting of expenditures. That offer, Congress retorted, was hollow since it already was a requirement.

The deliberations over the \$30 billion supplemental bill in the spring and summer of 2002 consumed a disproportionate amount of attention from the Congressional committees involved in budgeting, authorizing programs, and appropriating the funds for them. In addition to the legislation that created the Department of Homeland Security, the supplemental was one more distraction at a time when Congress was struggling with the dilemma of the reversal of the nation's financial outlook. A year earlier, projections were commonplace that budget surpluses would exist for the foreseeable future, the national debt would be managed, and alternative plans for "saving" Social Security were

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28. General Accounting Office, *Fiscal Year 2002 U.S. Government Financial Statements*, GAO-03-572T (Washington, DC, 8 April 2003).

29. GAO, "Oversight of Contingency Operations Cost."

aired. The combination of the 2001 tax cuts and the economic downturn following the terrorist attacks reversed that outlook. The Senate was incapable of passing a Budget Resolution for FY 2003 for only the second time since the process began in 1976. In the absence of a resolution, the authorizing and appropriating committee leaders became the spending conscience for the Congress. It was the end of June before the chairman of the Appropriations Committee established targets for the subcommittees to use in constructing the appropriations bills. Without the constraint of the rest of Congress, these targets were 12 percent above FY 2002 spending levels.<sup>30</sup>

In July 2002, the president amended his FY 2003 budget request by deleting the contingency clause on the request for \$10 billion DERF. It was determined that the contingency was a certainty and allocations were provided for personnel, operations and maintenance, and procurement accounts. The administration also requested the flexibility to move funds between these accounts. The appropriations committee placed the \$10 billion in the accounts approximately as described in the July budget amendment, but did not grant the administration the requested transfer authority. While the administration intended the allocation to be loosely defined targets, they were appropriated as firm figures.

The Bush administration took one more opportunity to request flexibility. The war on terrorism reached the point where world leaders anticipated (and some opposed) a U.S.-led invasion of Iraq. This would be expensive, the planned military operations were unconventional, and the administration made a case for budget flexibility in the supplemental budget request submitted less than a week after major fighting began in Iraq. The March 25, 2003, memo read, in part,

This request reflects urgent and essential requirements. Much of the funding has been requested with flexible authorities. This flexibility will ensure requirements can be immediately addressed as they arise despite the unpredictable scope, duration and intensity of operations. I ask the Congress to appropriate the funds as requested, and promptly send the bill to me for signature. I urge the Congress to refrain from attaching items not directly related to the emergency at hand.<sup>31</sup>

The Defense Department portion of the budget request totaled \$62.6 billion, of which \$59.9 billion was requested as DERF. The uses for the DERF were described in very broad terms; amounts qualified with phrases like “up to” and “at least.” Also requested was wide-sweeping transfer authority, including the retroactive reimbursement of accounts tapped to fund the military buildup and the authority to support the military operations of foreign nations. The requested transfer authority extended beyond the supplemental dollars. The memo requested that the language in the FY 2003 Defense

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30. Daniel J. Parks, “Midyear Spending Deal Likely in Early July; Democrats, Bush Harden Fiscal ’03 Lines,” *Congressional Quarterly Weekly*, 29 June 2002, 1730.

31. George W. Bush, Letter to the Speaker of the House of Representatives. *FY2003 Supplemental: Operation Iraqi Freedom*, 25 March 2003; available from: [http://www.whitehouse.gov/omb/budget/amendments/supplemental\\_3\\_25\\_03.pdf](http://www.whitehouse.gov/omb/budget/amendments/supplemental_3_25_03.pdf); accessed 30 December 2003.

Appropriations bill be revised to raise the transfer authority from \$2 billion to “2.5 percent of the total amount appropriated.” This equates to approximately \$9 billion. The department further proposed separate accounting for the funds and quarterly reporting. The request included \$250 million for the Executive Office of the President Emergency Response Fund for “unanticipated needs.” These funds would be available for transfer to any federal agency “for immediate or emerging terrorism-related prevention requirements throughout the federal government.”<sup>32</sup>

Given the scope of mobilization for the Iraqi phase of the war on terrorism, it was common knowledge that the administration would need this supplemental funding. Congress asked the GAO to conduct a review on the previous DERF appropriations. GAO reported that OMB provided adequate guidance, but DOD provided no further clarification and those charged with spending the DERF interpreted guidance in various ways, diminishing the quality of accounting for costs. Further, GAO noted the differences between the 10 OMB accounting categories and DOD’s regular appropriation structures. As DERF was transferred into other accounts, the funds were commingled, further complicating the accounting. DOD required the use of contingency operations accounting practices as articulated in the Financial Management Regulations, but they, too, did not align with the OMB requirements. In short, DOD had difficulty reporting accurately the use of prior DERF appropriations.<sup>33</sup>

There was a strong reaction in Congress to the Bush administration proposals. The Democrats on the House Appropriations Committee published a strongly worded document, “The Bush Administration and the Power of the Purse,” that stated the supplemental request included “proposals to circumvent Congress’s constitutionally mandated role” and “are a clear affront to Congress and the public’s responsibility to oversee taxpayer dollars.”<sup>34</sup> In the Senate, Sen. Robert Byrd (D-WV) took issue with the flexibilities in the proposal as highlighted in this exchange in an appropriations committee hearing on March 27, 2003:

**Sen. Byrd:** “You request the authority to exempt these funds from congressional notification procedures and from all laws that regulate how the United States may give to its friends. Those laws are there for a reason.... Last year, the Defense Department requested a similar \$10 billion reserve fund for operations in Afghanistan. Congress disagreed and worked with you to specify accounts for funding. Is there a specific reason why such an approach would not work today?”

**Sec. Rumsfeld:** “Senator, because the Congress did not provide the \$10 billion that we requested, the Department of Defense had to borrow from other accounts all through October, all through November, all through December, all through January, until we finally got \$6.1 billion, thanks to

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32. Ibid.

33. General Accounting Office, Defense Budget: Tracking of Emergency Response Funds for the War on Terrorism GAO-03-346 (Washington, DC, April 2003).

34. Congress, House of Representatives, Appropriations Committee, *The Bush Administration and the Power of the Purse*; available at: [http://www.house.gov/appropriations\\_democrats/supflexibility.htm](http://www.house.gov/appropriations_democrats/supflexibility.htm); accessed 30 December 2003.



this committee and the Congress, to pay back money that had already been spent. It's just a terrible way to operate.”

**Sen. Byrd:** “Well, Mr. Secretary, I understand it may be a terrible way, but we’re talking about the expenditure of the taxpayers’ money. . . . There are limitations, there will be limitations, there ought to be limitations. Why this situation is so different, I can’t understand. This country has fought several wars, and much more major than this war will probably be, insofar as length of time for the war and its duration the costs and the loss of manpower, and so on. So I see no reason—let me say again—for Congress to extend these flexibilities.”<sup>35</sup>

A few days later on the Senate floor, Senator Byrd spoke on the issue in an impassioned speech:

For decades, Presidential administrations have sought to wrap their fingers around the purse strings, push away the Congress, and ignore the Constitution. . . . It does not matter what administration it is. It does not matter the political party of the President. What matters is nothing more than raw power. . . . Congress has it. The executive branch wants it. The cry went out: “Give us flexibility. . . . But it was not really flexibility that the administration wanted; it was power, power, power over the purse, power over the Congress. Wisely, the House and Senate Appropriations Committees limited this power grab in this supplemental request.”<sup>36</sup>

Further, there was significant skepticism in the media regarding the appropriateness of the Iraq phase of the war on terrorism and the manner in which it was being conducted. This criticism of the administration resonated with some members of Congress and in some constituent communities.

Congress moved very quickly on the supplemental appropriation bill. Hearings were completed by April 7 and a conference committee convened on April 8. The committee reported out on April 12 and both houses of Congress passed the bill the same day. The president signed the supplemental appropriation a few days later. While the Defense Department received the \$62.6 billion it requested, it did not contain the desired flexibility. Said the undersecretary of defense (comptroller), “We didn’t get everything we wanted. We asked for a lot more in the way of flexibility, in the region of \$59 billion. If you parse what the actual language of the bill is and report language and so on, you see that the flexibility is closer to between 10 1/2 and 11 billion.”<sup>37</sup>

What DOD Comptroller Dov Zakheim was referring to was the creation of the Iraqi Freedom Fund (IFF). Rather than appropriate \$59 billion into DERF as the administration requested, Congress instead established the Iraqi Freedom Fund with \$15.7 billion. Of that amount, over \$5 billion was earmarked for various uses, arriving at the

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35. Congress, Senate, Appropriations Committee, *Fiscal Year 2003 Supplemental Budget Request*. 108th Cong., 1st session, 27 March 2003.

36. Congressional Record. 2003. 108th Cong., 1st session, 149 Cong. Rec. S 5397, Vol. 149, pt. 59.

37. Dov S. Zakheim, Press Briefing Transcript (April 16, 2003); available at: <http://www.defenselink.mil/transcripts/2003/tr20030416-0113.html>; accessed 19 June 2004.

“between 10 1/2 and 11 billion” figure cited by Zakheim. Congress further stipulated, “As of October 31, 2003, all balances of fund remaining in the ‘Defense Emergency Response Fund’ shall be transferred to, and merged with, the ‘Iraqi Freedom Fund.’” In short, at the end of October, DERF would cease to exist as a separate account for new spending. With respect to other flexibilities sought, Congress denied the request for a Presidential Emergency Response Fund and compromised on the issue of expanded transfer authority.

Although all remaining balances in DERF were transferred to the Iraqi Freedom Fund in the fall of 2003, that did not end congressional scrutiny. As recently as May 2004, congressional appropriators were questioning the use of DERF funds to prepare for the invasion of Iraq. Bob Woodward alleged such spending occurred in his book, “Plan of Attack”, which raised concerns in Congress. Media interest of defense mismanagement is cited as an incentive for congressional oversight.<sup>38</sup> Scrutiny and oversight of DOD spending on the war on terrorism continued through the deliberations of the FY 2005 “bridge” appropriation and the spring 2005 supplemental.

## DISCUSSION

This research found that, first, Congress delegated budget authority to DOD under crisis conditions, where it is perceived that such flexibility is warranted and must be provided expeditiously to assist the president in responding to a national security emergency. There was little debate in Congress on whether funds should be appropriated for defense; nearly all members were in agreement. Thus, in the first supplemental appropriation after 9–11, Congress delegated authority to DOD because of the exigency of the situation, similar to the practice of providing minimally constrained emergency appropriations in response to natural disasters.<sup>39</sup>

Second, Congress initially delegated considerable authority but then serially withdrew much of this delegation over time for DERF and other defense supplemental appropriations. One finds Congress gradually returning to traditional methods of oversight: hearings and testimony, reporting requirements, reprogramming and transfer restrictions, earmarked funds, reviews and investigations by legislative entities, and the fencing of funds pending compliance with provisions.

Finally, this case is quite instructive about the evolution of the budgetary relationship between Congress and DOD. Presidential administrations have sought increased delegation of authority and control over budget execution over the past four decades, particularly as congressional oversight of the budget increased. Immediately after the September 2001 terrorist attacks when the scope and nature of the U.S. response

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38. Lindsay; Jones and Bixler.

39. McCaffery and Godek.

was unclear, Congress was fairly comfortable with Bush administration requests for increased budget execution autonomy. As Congress initially accommodated the request, the Bush administration was emboldened to ask for increasingly more autonomy. Congress, in turn, expressed increased concern over the shift of constitutional authority and became more dubious of the “you can trust us” attitude of the Bush administration and DOD. Reasons included doubt about U.S. antiterrorism initiatives, especially the war in Iraq, and longstanding budget, management, and accounting problems within DOD. As Congress tightened control, the administration was compelled to ask for even greater flexibility, culminating in the March 2003 supplemental request for tens of billions of relatively unfettered authority. Congress reacted strongly and not just refused to provide the flexibility sought; in doing so, it all but eliminated the delegated authority previously authorized. Why? Incentives changed.

Numerous incentives exist for Congress to attempt to actively influence Defense Department policy, budgets and internal management practices, and many means exist to carry out its oversight and policy direction. In the case of the DERF, Congress did not exercise most of these tools at first because sufficient incentive did not exist; in fact disincentives to micromanage were present. The incentive for Congress to support the president’s request was greater than the incentive to intrusively manage DOD budget execution. In fact, the incentive for members was to appear to be as patriotic or more so than political opponents, partially explaining why, when the president requested a \$20 billion supplemental appropriation, Congress quickly appropriated \$40 billion. Combating terrorism is not specific to any congressional district or set of constituents. In the crisis climate immediately after 9/11, partisan politics were minimized, but only temporarily. At that point, attempts to manipulate defense and national security appropriations for parochial interests would have been politically inappropriate. It is apparent that Congress did not, in fact, delegate much budget authority to the Defense Department as a deliberate choice. Rather, Congress did not perceive an advantage in denying such authority. Congress, at first, had political reasons to restrain itself. However, once the political environment changed and with it the shift in the incentive structure, Congress shifted from delegation to activism, returning to familiar patterns of behavior.

## CONCLUSION

We may anticipate that some critics of our study and findings might observe, in effect, “so what else is new?” What our research contributes to the literature is a detailed empirical study of an exceptional case with regard to congressional control of defense budgeting, a circumstance where Congress denied itself the opportunity to micromanage and delegated significant budget execution authority to DOD. The conventional wisdom relative to Congress is, essentially, that it is not capable of relaxing such control. We demonstrate that such is not always the case. With DERF, as with the process for Base Realignment and Closure (BRAC), under some circumstances Congress is willing to

delegate a considerable degree of control.<sup>40</sup> However, when conditions change the delegation may be withdrawn. This has not happened with BRAC, but it did with the DERF.

The purpose of this study was not to criticize either Congress or the DOD relative to the degree of delegation of management and budget authority provided to DOD. Rather, our intent was to explore the circumstances under which Congress is more or less likely to delegate budget execution authority. The case study of DERF provides insights into the variables that influence the degree and types of delegation Congress will support. We have demonstrated that under conditions where there is a perception of high uncertainty and significant imminent threat to U.S. national security, Congress responds to DOD requests for increased delegation. Once uncertainty or immediacy is reduced, and after the foreign policy objectives of the executive branch become clear—and where these objectives and the means for achieving them become more controversial—Congress is far less likely to delegate authority to the executive branch and to the DOD.

### NOTE

Portions of the article are drawn from “The Defense Emergency Response Fund: A Case Study of Delegation of Budget Authority by Congress to the Department of Defense” presented at the annual meeting of the Association for Budgeting and Financial Management of the American Society of Public Administration, Chicago, IL, 6–9 October 2004. The authors would like to thank Phil Joyce, Fred Thompson, and Denise Fantone for their helpful suggestions at that forum, the anonymous reviewers at *PB&F*, and their colleagues at the Naval Postgraduate School.

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40. Fred Thompson, “Why the American Military Base Structure Can’t Be Reduced,” *Public Administration Review* 48, no. 1 (1988): 577–567.